Supreme Court, U. S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1979

NO. ~~79-~~1363

BRADLEY ARNOLD ASH,

Petitioner

vs.

THE UNITED STATES OF AMERICA,
and W. GRAHAM CLAYTOR, JR.,
as Secretary of the United States Navy,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

To the Honorable WARREN E. BURGER, Chief Justice of the United States of America, and to the Honorable Associate Justices of the United States Supreme Court:

Comes now BRADLEY ARNOLD ASH, Petitioner, by his attorney, Roger J. McDonald, Esq. of Orlando, Florida, a member of the Bar of the United States Supreme Court, petitioning this Honorable Court for a Writ of Certiorari directed to the United States Court of Appeals, Fifth Circuit at New Orleans, Louisiana, to review an error occurring in

its affirmation of the Final Judgment issued by the United States District Court for the Middle District of Florida, Orlando, Florida interpreting the "Privacy Act" 5 U.S.C. § 552a, as it effects the Navy's administering of "non-judicial punishment", commonly referred to as "Captain's Mast".

Pursuant to Rule 23, Rules of the Supreme Court of the United States, Petitioner submits the following:

(a)

OPINION BELOW

The United States Court of Appeals, Fifth Circuit rendered opinion on December 12, 1979, a copy of which is attached to this petition as "Exhibit A". Judgment was rendered on December 12, 1979, a copy of which is attached to this petition as "Exhibit B". Local Rule 16 of the United States Court of Appeals, Fifth Circuit, states that it is not necessary to file a petition for rehearing as a prerequisite to the filing of a petition for certiorari in the Supreme Court of the United States.

(b)

JURISDICTIONAL GROUNDS

The grounds upon which the jurisdiction of this Honorable Court is invoked are:

(i) the date that the judgment which is sought to be reviewed was entered is December 12, 1979;

(ii) rehearing was not necessary;

(iii) the statutory provision conferring jurisdiction on this Honorable Court is 28 U.S.C. § 1254(1).

(c)

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals for the Fifth Circuit erred in sustaining the trial courts Final Judgment adjudicating that the "disclosure" of Petitioner's "non-judicial punishment" in a military base publication was a disclosure allowed under the Privacy Act?

(d)

UNITED STATES STATUTORY PROVISIONS INVOLVED

The Opinion issued by the United States Court of Appeals for the Fifth Circuit set forth two (2) statutory grounds for their holding. The privacy Act, 5 U.S.C. 552a prohibits the disclosure of records maintained on an individual except in limited circumstances. Those very limited circumstances are eleven (11) in number and to not have violated the privacy act one must rely on one of the eleven exceptions to non-disclosure. The appellate court cited 5 U.S.C. § 552a(a)(7) as incorporated in the exceptions through 5 U.S.C. § 552a(b)(3) which deals with "routine use". However, the appellate court has had to recede from using that basis for its opinion since routine use was not authorized under federal law due to the failure of the military to publish in the Federal Register a notice of routine use of such records as required

under 5 U.S.C. § 552a(e)(4)(D). The courts receding from that ground is set forth in "Exhibit C" attached hereto.

The other statutory grounds for the courts holding was 5 U.S.C. § 552a(b)(1) which is set forth below.

"Conditions of Disclosure. No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to any agency, except pursuant to a written request by, or with the prior written consent of the individual to whom the record pertains, unless disclosure of the records would be:

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties".

(e)

STATEMENT OF THE FACTS IN SUPPORT OF GRANT OF CERTIORARI

Petitioner was a member of the United States Navy as an enlisted man. Residue of a marijuana cigarette was found in the Petitioner's car ash tray and he was reported to his commanding officer. No criminal proceedings were instituted. In lieu thereof, the Petitioner's commanding officer chose to merely administer "non-judicial punishment" pursuant to 10 U.S.C.A. § 815, called in the Navy "Captain's Mast".

The Petitioner was aware that the Navy base published in a base periodical called the "Plan of the Day" the results

of all non-judicial punishments. Petitioner being greatly concerned about that publicity and disclosure did research prior to meeting with his commanding officer on the subject of the "Privacy Act". The Petitioner found a memorandum from the Department of the Navy concerning the Privacy Act and Article 15 (non-judicial punishments) which stated that ". . . disclosure without the written consent of the individual who received the punishment" should not be made. With this memorandum in hand the Petitioner went to meet with the commanding officer and asked to speak with him in private before the administering of the non-judicial punishment. The commanding officer heard and rejected the Petitioner's request for privacy. Thereafter, several sergeants who were in the room at the request of the commanding officer witnessed the non-judicial punishment.

Several days later the Petitioner's name, violation of the Uniform Code of Military Justice and the punishment imposed appeared in the Plan of the Day.

Thereafter, due to the embarrassment, harassment, and ridicule which the publication and disclosure brought upon the Petitioner and Petitioner's belief that his rights had been violated, a suit was filed in the United States District Court for the Middle District of Florida, Orlando, Florida, for a violation of 5 U.S.C.A. § 552a, commonly called the "Privacy Act".

The basis for federal jurisdiction in the United States District Court for the Middle District of Florida, Orlando, Florida, is found in 5 U.S.C. § 552a(g)(1).

(f)

ARGUMENT

The reason for the Court to issue a Writ of Certiorari to review the opinion of the United States Court of Appeals, Fifth Circuit, is that an important question of federal law which has not been, but should be, settled by this Court is addressed in that lower court judgment. That is, whether or not the military in administering "non-judicial punishment" is subject to the requirements of 5 U.S.C.A. § 552a, commonly called the "Privacy Act". In human terms, each year thousands of military men and women are being needlessly defamed and stigmatized by the military advertising the results of their non-judicial punishment. This is true since the Privacy Act makes no exception for this type of disclosure.

The trial court and the appellate court both accepted the government's argument that disclosure was authorized under 5 U.S.C.A. § 552a(b)(1) which essentially creates an exception for a very narrow group of people to whom a disclosure can be made. Those people would be the "officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties". Both of the lower courts have given this narrow exception an extremely wide definition. That is, they have in essence said that everybody on base has a need to know about this purely administrative matter. By doing that the lower courts have totally missed the intent of Congress. Keeping in mind that the exceptions should not consume the rule the proper interpretation of § 552a(b)(1) is that those "officers and employees" of the

Petitioner's Navy base "who have a need for the record in their (immediate) performance of their duties" are entitled to the record and no others. Examples of those entitled to disclosure would be the personnel department who would keep the record concerning the non-judicial punishment, the finance department, the promotion board who would have the right to review such a record when considering promotion and that sort of narrow "need to know" type of person and function.

The Appellate Court in its opinion spent considerable time elaborating about the Navy's traditional punishment of parading an offender to the ships mainmast and collecting all of the sailors on board and the captain administering punishment for all to see and learn from. However, this 17th century mentality is precisely the type of defamation and stigmatizing which was the basis for Congress passing 10 U.S.C.A. § 815 which is known as the "non-judicial punishment" statute. To show this court the validity of that statement the following congressional findings is submitted:

> "The Department of Defense has stated that problems adversely affecting morale and discipline have been created in the armed forces because of the inadequate powers of commanding officers to deal with minor behavorial infractions without resorting to the process of the military court-martial system. The limited non-judicial punishment authority has proved unsatisfactory to commanders in the field. The alternative solution has been to impose a trial by a summary or special court-martial. In most cases, the court-martial results in a serious impairment of the services of an officer or an enlisted man. Such a conviction stigmatizes a person with a criminal conviction on his record, which not only

> remains throughout his military career, but follows him into civilian life. It may well interfere with his civilian job opportunities, as for example, when he is requested to show on a questionnaire whether he has ever been convicted, and it may adversely reflect on him if he is involved with difficulties with civilian law enforcement agencies. The bill, (non-judicial punishment) by providing increased authority for non-judicial punishment, will enable commanders to deal promptly and efficiently with the problems of discipline. At the same time increased non-judicial authority should permit the services to reduce substantially the number of court-martials for minor offenses which result in stigmatizing and impairing the efficiency and moral of the person concerned. As for example, the Army has indicated that they will expect that above 75 percent of the summary court-martials would be eliminated by enacting of this legislation."

U.S. Code and Congressional and Administrative News, Volume 2, 87th Congress Second Session 1962, Page 2381

In fact, the same congressional findings specifically make reference to "Rules for the Regulation of the Navy of the United States," as adopted by the Continental Congress in 1775, as well as citing other historical military punishment problems which led up to the need to change the traditional system to be more responsive to handling modern troops.

Additionally, on page 2380 of said legislative history it sets forth that,

> "this punishment is referred to as a non-judicial punishment. Since the punishment is non-judicial, it is not considered as a conviction of a crime and in this sense has no connection with the military court-martial system".

This stated purpose of Congress clearly rejects any idea that the punishment administered to this particular Petitioner was any kind of judicial proceeding which is admittedly outside the purview of the Privacy Act.

Apparently the appellate court has confused the non-judicial punishment statute with judicial punishment and therefore, applied the standards relating to judicial punishment to those of non-judicial punishment and its effect on the Privacy Act. This can be clearly seen when the Court cites *Cox Broadcasting Corp. vs. Cohen,* 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975). That case deals with a rape in Georgia and the victim's father suing the news media for invasion of privacy. This Honorable Court decided that the news media was protected by the 1st and 14th amendments of the United States Constitution. Also, there is dicta that since the criminal case was a public proceeding there was no privacy interest which would give rise to a cause of action.

Also, the appellate court suggested that the Captain's Mast was open to the personnel of the command, and tied that erroneous assumption to the *Cox Broadcasting Corp. vs. Cohen, supra.* The current Judge Advocate Generals Manual, subsection 0101d(2) states,

> "All article 15 hearings shall, when requested by the alleged offender, be open to the public to the extent permitted by available space unless, in the opinion of the officer contemplating the imposition of non-judicial punishment, security interests dictate otherwise".

It is clear that under the current manual Article 15s or otherwise known as "non-judicial punishment", or in the Navy as "Captain's Mast" is supposed to be a private administrative matter between a commander and his subordinate. Obviously, if the Petitioner wanted to have people present to preclude any prejudice or impropriety from occurring he could invoke his right to have the proceedings "open to the public". Just the reverse was wanted by this Petitioner. His rights to privacy in the administering of this non-judicial punishment (Captain's Mast) and his rights to privacy in the non-disclosure of the matter was invoked from the very first instance and violated by the government from the very first instance.

CONCLUSION

Therefore, due to the true nature of a Captain's Mast (non-judicial punishment) and it being subject to non-disclosure under the federal law known as the "Privacy Act" and no legal exception to non-disclosure being found, this court should grant the petition and right the wrong committed in this instance and being committed each and every day against thousands of men and women in the armed service who are in fact entitled to protection under the Privacy Act.

DATED this 4th day of March, 1980, at Orlando, Florida.

Respectfully submitted,

ROGER J. McDONALD, ESQ.
Member of the Bar,
United States Supreme Court
Attorney for Petitioner

EXHIBIT A

BRADLEY ARNOLD ASH, Plaintiff-Appellant
No. 79-1433 United States Court of Appeals, Fifth Circuit
UNITED STATES OF AMERICA, et al., Defendants-Appellees
December 12, 1979

OPINION

Suit was brought by plaintiff, who had been punished by the Navy for possession of marijuana in an open nonjudicial proceeding, under the Privacy Act contending that his privacy was infringed when his name, offense and punishment were published in daily bulletin of his command. The United States District Court for the Middle District of Florida, at Orlando, John A. Reed, Jr., J., granted summary judgment for the United States, and plaintiff appealed. The Court of Appeals, Gee, Circuit Judge, held that: (1) disclosure to personnel of command of result of proceedings that were open to them, and in that sense public, was not such a disclosure as the Act forbids, and (2) publication of matter complained of was a "routine use" of it under the Privacy Act.

1. Records 31

"Disclosure" to personnel of naval command of result of non-judicial proceedings that were open to them, and in that sense public, was not such a disclosure as the Privacy Act forbids. 5 U.S.C.A. § 552a; 10 U.S.C.A. § 815.

2. Records 31

Publication of Captain's Mast results within command is

purpose compatible with conducting and recording such summary proceedings, which are designed to maintain discipline, handle minor disciplinary problems promptly and effectively, eliminate stigma attached to criminal convictions by courts-martial, and to demonstrate fairness of proceedings, and thus publication of plaintiff's name, offense and punishment imposed in open nonjudicial proceeding in daily bulletin of naval command was a "routine use" of such information under the Privacy Act 5 U.S.C.A. § 552a(a)(7); 10 U.S.C.A. § 815.

See publication Words and Phrases for other judicial constructions and definitions.

Appeal from the United States District Court for the Middle District of Florida

Before, GEE, HENDERSON and HATCHETT, Circuit Judges.

GEE, Circuit Judge:

Appellant Ash, punished by the Navy for possession of marijuana in an open nonjudicial proceeding, brought this suit for damages grounded in the Privacy Act, 5 U.S.C. §552a. In it he contends that his privacy was infringed when, over his objections, his name, offense and punishment were published in the daily bulletin of his command. The court below granted summary judgment for the United States, concluding that the disclosure was proper under the "need to know" exception, 5 U.S.C. §552a(b)(1), and, alternatively, that since the proceedings themselves were open to personnel of the command, publication of their results to the same command was not a "disclosure" under the Act. We affirm.

(1) We agree with the district court that the "disclosure" to personnel of a command of the results of proceedings that were open to them - and in that sense public - is not such a disclosure as the Act forbids. Cf. Cox Broadcasting Corp. v. Cohen, 420, 95 S.Ct. 1029, 43 L.Ed2d 328 (1975) (no invasion of privacy where further publicity gave facts already public).

(2) More fundamentally, we think that the publication of the matter complained of was a "routine use" of it, as that term is defined in the Privacy Act:

> (7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.[1]

To know, then, whether reporting the recorded outcome of such nonjudicial, punitive proceedings as Ash's is a use of it for a purpose "compatible with the purpose for which it was collected," we must consider that purpose.

Such summary proceedings, called in the Navy a Captain's Mast, have a history in our armed forces dating back to the American Revolution. Traditionally, the Captain's Mast was held near the ship's mainmast, before the assembled crew, where general announcements, summary punishments, and awards were given. This ancient proceedings is presently conducted under the general authority of Article 15, Uniform

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1. 5 U.S.C. § 552a(a)(7)

Code of Military Justice, [2] dealing with minor offenses and infractions of discipline. Traditionally, it has been open to the crew (Command). Subsumed in its general purpose of maintaining discipline are numerous subsidiary ones: Handling minor disciplinary problems promptly and effectively, eliminating the stigma attaching to criminal convictions by courts-martial, and demonstrating the fairness of the proceedings so that justice may be both done and seen to be done. [3] All of these purposes are plainly rational and germane to the maintenance of discipline. We conclude that publicizing the record of Captain's Mast results within the command is a purpose compatible with conducting and recording them.

Our conclusion is reinforced when we examine the legislative history of the Privacy Act. This reflects congressional concern that records assembled and (often) committed to a computer for one purpose may be used for other purposes, perhaps ones entirely foreign to the original. [4] The shade of Big Brother was called up from the 1984's limbo. For example, Senator Percy, one of the Act's co-sponsors, commented:

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2. 10 U.S.C. s815

3. See, e.g. SRep.No.1911, 87th Cong. 2d Sess. (1962), reprinted in (1962) U.S. Code Cong. & Admin. News, pp 2379-2392; The Marine Corps Equal Opportunity Manual, MCO P5354.1, subp. 3005.4 (Nov. 8, 1976).

4. See the Congressional Findings and Statement of Purposes in Pub. L. 93-579, s 2, 88 Stat. 1896 (1974).

> In and of itself, any of these personal files is not particularly ominous. Most people readily accept the fact that data gathering systems are necessary to our institutions if they are to keep pace with the complex needs of a modern society. Without records there would be chaos. The real problem, comes, however, when these information systems are linked with one another and are used to exchange information without the knowledge or consent of the individuals concerned. When personal data collected by one organization for a stated purpose is used and traded by another organization for a completely unrelated purpose, individual rights could be seriously threatened.

120 Cong.Rec. 36893-4 (1974).

Nothing of that sort has happened here. Instead, one and the same organization - a Navy command - has disseminated among its members the record of an administrative punishment, one inflicted in lieu of a more stigmatizing criminal one, for the purpose of showing that infractions of its governing laws will be swiftly and condignly punished. The judgment below *is*

AFFIRMED.

EXHIBIT B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-1433
Summary Calendar

D.C. Docket No. 77-434-ORL-CIV-R

BRADLEY ARNOLD ASH,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

Before, GEE, HENDERSON and HATCHETT, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, AFFIRMED;

IT IS FURTHER ORDERED that plaintiff-appellant, Bradley Arnold Ash, pay to defendants-appellees, United States of America, Et Al., the costs on appeal to be taxed by the Clerk of this Court.

December 12, 1979

Issued as Mandate: February 11, 1980

EXHIBIT C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-1433

BRADLEY ARNOLD ASH,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

Before GEE, HENDERSON, and HATCHETT, Circuit Judges.

BY THE COURT:

Appellees, in a "Motion to Modify Opinion," chivalrously disavow "routine use" as a basis for judgment in their favor on grounds that they disavowed it as a contention in response to a request for admission below. Though remaining convinced of the correctness of our discussion of this point, we accede to their request and withdraw that portion of the opinion. Since this was an alternative ground of our decision, the result is not changed. It is so ORDERED.

EXHIBIT D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

No. 77-434-Orl-Civ-R

BRADLEY ARNOLD ASH,

Plaintiff,

vs.

UNITED STATES OF AMERICA
and W. GRAHAM CLAYTOR, JR.,
as Secretary of the United States Navy, etc.,

Defendants.

MEMORANDUM OF DECISION

The plaintiff by Count 1 of his complaint claims the right to recover damages from the United States and W. Graham Claytor, Jr., as Secretary of the United States Navy, for an alleged violation of the Privacy Act of 1974, 5 U.S.C. § 552a. Both sides have moved for summary judgment. The plaintiff's memorandum in support of his motion for a summary judgment does not discuss the claim asserted in Count 2 of the complaint. This court, therefore, considers that count to have been abandoned.

From a review of the record, the following facts appear without dispute. On 14 June 1977, the plaintiff was a member

of the United States Navy Reserve with a grade of "DP3." He was stationed at the Recruit Training Command in Orlando, Florida. On that date he went before his Commanding Officer, Captain William G. Fisher, Jr., as the subject of a disciplinary proceeding authorized by 10 U.S.C. § 815. Based on evidence presented to him, Captain Fisher determined that the plaintiff had committed an offense in violation of 10 U.S.C. § 892 and imposed nonjudicial punishment upon him consisting of a foreiture of $100.00 of military pay per month for two months. The punishment also included a reduction from pay grade "E-4" to E-3"; however, the imposition of this punishment was suspended for six months (paragraph 2 of Fisher affidavit). No issue is raised as to the fact of the violation or the application thereto of the procedure established by 10 U.S.C. § 815. The proceeding was open to attendance by Navy personnel having no interest in the case (paragraph 5, Fisher affidavit; paragraph 7, Ash affidavit). On 21 June 1977, without the plaintiff's consent, his name, a description of the offense and the punishment was published in the "Plan of the Day" (Attachment "A" to the complaint and paragraph 9 of plaintiff's affidavit). The "Plan of the Day" is a written publication for the use and benefit of Navy personnel at the Recruit Training Command at Orlando.

The sole question presented by the motions for summary judgment is whether or not the publication of the plaintiff's identity and punishment violated the provisions of the Privacy Act, 5 U.S.C. § 552a(b). The court concludes that the question should be answered in the negative.

The proceeding before the Commanding Officer was for the purpose of determining whether or not a law violation had occurred and the imposition of punishment, if appropriate. Publication of the results of such a proceeding has much the same effect as the publication of the sentence of a civilian court. It tends to deter the individual involved and others similarly situated from future misconduct and it tends to assure the evenhanded application of the power to punish. Since the achievement of these ends is reasonably related to and necessary for the efficient functioning of the naval command to which the record was published, the court concludes that the publication was authorized under the provisions of 5 U.S.C. § 552a(b)(1).

Also, because the disciplinary proceeding was open to the personnel of the command, it is logical to conclude that the publication of the result was not the type of disclosure contemplated by § 552a(b). The findings of Congress published in § 2 of Public Law 93-579 appear to substantiate this conclusion.

For the foregoing reasons, the defendants' motion for summary judgment will be granted and the plaintiff's motion will be denied.

DONE AND ORDERED in Chambers at Orlando, Florida, this 9th day of January, 1979.

JOHN A. REED, JR.
Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of March, 1980, I served the within PETITION FOR WRIT OF CERTIORARI on the interested parties in said action, by placing three true and correct copies in each of two sealed envelopes, with postage thereon fully prepaid, in the United States mail at New Orleans, Louisiana, addressed as follows:

Kendell W. Wherry,
Assistant United States Attorney
Suite 501, Federal Building and
United States Courthouse
80 North Hughey Avenue
Orlando, Florida 32801

Douglas N. Letter
Appellate Staff, Civil Division
Department of Justice
Washington, D.C. 20530

I CERTIFY under penalty of perjury that the foregoing is true and correct.

EXECUTED ON March 4, 1980 at New Orleans, Louisiana.

ROGER J. McDONALD